Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

AMERICAN RELIABLE INSURANCE COMPANY,
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,
AND CAMPBELL INSURANCE SERVICES, INC.,
Petitioners,

v.

ROBERT STILLWELL AND HELEN STILLWELL,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of West Virginia is required by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), and the Supremacy Clause of the Constitution of the United States, to provide an immediate appeal from a trial court's order denying a motion to compel arbitration of a dispute governed by the FAA.

2. Whether the Supreme Court of Appeals of West Virginia erred in failing to reverse the trial court's order which refused to compel arbitration pursuant to the FAA based on grounds that (i) the FAA does not apply, and (ii) the arbitration provision was unenforceable because it was not separately "bargained for."

PARTIES

Petitioners:

American Reliable Insurance Company, American Bankers Insurance Company of Florida, and Campbell Insurance Services, Inc.

Respondents:

Robert Stillwell and Helen Stillwell.

RULE 29.6 STATEMENT

American Reliable Insurance Company and American Bankers Insurance Company of Florida are wholly owned subsidiaries of American Bankers Insurance Group, Inc., which is an indirect wholly owned subsidiary of Fortis, Inc. No publicly held company owns 10% or more of the stock of American Bankers or American Reliable. Campbell Insurance Services, Inc. is privately owned, and no parent corporation or publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, American Reliable Insurance Company ("American Reliable"), American Bankers Insurance Company of Florida ("American Bankers"), and Campbell Insurance Services, Inc. ("Campbell"), respectfully petition for a writ of certiorari to review a 3 to 2 decision by the Supreme Court of Appeals of West Virginia which held that West Virginia is not required to provide an immediate interlocutory appeal of an order denying a motion to compel arbitration and stay judicial proceedings under the FAA. As a result, the State of West Virginia (along with four other states) continues to completely frustrate the purpose and intent of the FAA by forcing parties to suffer the time and expense of a full blown trial on the merits in state court, preceded by the full array of civil discovery devices, before obtaining any appellate review of even the most frivolous of state trial court decisions denying the right to compel arbitration or stay judicial proceedings under the FAA. As discussed in more detail below, the decision of the West Virginia Supreme Court (i) directly conflicts with this Court's decision in *Southland Corp. v. Keating*,[1] (ii) is directly contrary to Section 16(a)(1)(A) and (B) of the FAA, and (iii) conflicts with the laws of over 40 other states which properly provide an immediate appeal of an order denying arbitration under the FAA.

OPINIONS BELOW

The original order of the Circuit Court of Ohio County, West Virginia (the "trial court"), which denied the Petitioners' motion to compel arbitration, is not reported (App.,

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[1] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

infra, 1a-2a). Also unreported is the trial court's subsequent order denying the Petitioners' motion to certify the earlier ruling for interlocutory appeal to the West Virginia Supreme Court of Appeals (App., *infra*, 3a-7a). The Supreme Court of Appeals of West Virginia issued three relevant orders, all of which are unreported: an order denying Petitioners' Petition for Writ of Prohibition (App., *infra*, 8a-10a); an order denying Petitioners' Petition for Appeal (App., *infra*, 11a-12a); and an order denying Petitioners' motion for rehearing of the denial of its Petition for Appeal (App., *infra*, 13a-15a).

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia denying the Petition for Appeal was entered on January 10, 2002 (App., *infra*, 11a-12a). A subsequent order denying Petitioners' motion for rehearing was entered by the Supreme Court of Appeals of West Virginia on March 13, 2002 (App., *infra*, 13a-15a).

This Court has jurisdiction under 28 U.S.C. § 1257 and *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984), which held that the Court has jurisdiction under *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) to review the decision of a state's highest court which "seriously erode[s] federal policy" with respect to arbitration rights under the FAA. *Southland Corp.*, 465 U.S. at 7 ("the failure to accord immediate review of the decision of the California Supreme Court might 'seriously erode federal policy'" under the FAA); *id.* at 6 ("[w]ithout immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue"); *id.* at 7-8 ("For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its

course would defeat the core purpose of a contract to arbitrate.").[2]

This case involves an important federal issue under the FAA which has been finally decided by a state court of last resort and which, if not immediately reviewed, will continue to undermine and frustrate the purpose and intent of the FAA in violation of the Supremacy Clause. Without immediate review "there may be no opportunity to pass on the federal issue" and, as a result, West Virginia (and four other states, *see infra* note 4) will continue effectively to nullify federal rights under the FAA.[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution of the United States provides in relevant part:

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[2] *See also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683-84 (1996) (granting certiorari to review decision of Montana Supreme Court holding state statute which rendered arbitration clause unenforceable was not preempted by FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995) (petition for writ of certiorari granted to review Alabama Supreme Court's holding that FAA did not apply due to insufficient contacts with interstate commerce).

[3] *Southland*, 465 U.S. at 6. This is also a situation in which the federal issue continues to arise, yet repeatedly evades review, and may disappear here if the Petitioners prevail in the state court "on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." *Id.* (quoting *Cox*, 420 U.S. at 483).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, provides, in relevant part:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2).
>
> * * *
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is

not in default in proceeding with such arbitration. (9 U.S.C. § 3).

* * *

An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed .... (9 U.S.C. § 16(a)(1)(A) and (B)).

STATEMENT OF THE CASE

This is a case in which the Petitioners tried in vain to obtain review of a plainly erroneous trial court ruling which denied their motion to compel arbitration and to stay judicial proceedings pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. The degree of frivolity with which a state trial court disregards federal rights under the FAA is, however, irrelevant in West Virginia, because West Virginia is one of five states which simply does not provide a right to interlocutory appeal of an order denying a motion to compel arbitration.[4] As a result, directly contrary to this Court's

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[4] The other four states which deny such a right are Connecticut (*see Success Centers, Inc. v. Huntington Learning Centers, Inc.*, 613 A.2d 1320 (Conn. 1992) (holding no appeal of denial of motion brought under Conn. Gen. Stat. § 52-409)); Delaware (*see Signal One LLC v. Signal Capital Corp.*, 760 A.2d 163, 163 (Del. 2000) (denying appeal as interlocutory)); Oregon (*see Bush v. Paragon Property, Inc.*, 997 P.2d 882, 887 (Ore. Ct. App. 2000) (holding court did not have jurisdiction to entertain appeal)); and Texas (*see*

(continued...)

decision in *Southland*, which cogently explained why an immediate appeal is necessary to prevent the derogation of Congress' objectives, West Virginia not only frustrates the federal policy embodied in the FAA, but encourages its trial courts to ignore the very existence of the FAA and controlling arbitration decisions of this Court.

A. Material Facts

The Respondents (the "Stillwells") are residents of the State of West Virginia who entered into a contract with Petitioner American Reliable, an Arizona insurance company, to insure property located in Ohio. The Stillwells allege that Campbell, an Ohio company, is the general agent of American Reliable and that American Bankers, a Florida company, was involved in the adjustment of their claim for insurance benefits under the contract. The insurance contract contained an arbitration provision which provided in part as follows:

> Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions of this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by arbitration in accordance with the Federal Arbitration Act (9 U.S.C. § 1 ET SEQ).

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[4] (...continued)
Anglin v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (holding that there is no immediate right to appeal where contract is governed by the FAA)).

App., *infra*, 16a-17a. After a dispute arose over the benefits payable under the contract, the Stillwells filed suit in West Virginia state court against American Reliable, Campbell, and others. Approximately thirteen months later, the state court allowed the Stillwells to amend their complaint to convert their case into a "class action" and to add American Bankers as a defendant. On May 1, 2001, all of the Petitioners moved in the trial court to stay judicial proceedings and compel arbitration pursuant to the FAA.

B. Trial Court Orders

On June 11, 2001, the West Virginia trial court denied the Petitioners' motion to compel arbitration and to stay judicial proceedings. App., *infra*, 1a-2a (the "Arbitration Order"). The only reason given in the Arbitration Order for denying arbitration was that the arbitration provision was not separately "bargained for" under West Virginia law. Thus, directly contrary to black letter law under the FAA, the trial court decided to discriminate outright against the arbitration provision by treating it differently than all of the other provisions in the contract. *See infra* p. 18.

On August 6, 2001, the Petitioners filed with the trial court a motion to certify the Arbitration Order to the Supreme Court of Appeals of West Virginia for interlocutory appeal pursuant to West Virginia Code § 58-5-2 (the "Motion for Certification"). At the August 30, 2001 hearing on that motion, counsel for the Petitioners also requested reconsideration of the Arbitration Order. *See* App., *infra*, 4a.

By order entered on October 1, 2001, the trial court denied the Motion for Certification. App., *infra*, 3a-7a. For the first time, the trial court revealed that it was ignoring the FAA

and that it "ha[d] decided that the Federal Arbitration Act does not apply to this action." App., *infra*, 4a.

C. Petition For Writ Of Prohibition

On September 27, 2001, Petitioners filed a Petition for Writ of Prohibition with the Supreme Court of Appeals of West Virginia. The Petition pointed out that, given the undisputed involvement of parties from four different states, there was no question that interstate commerce was involved and that the FAA governed this dispute. *See, e.g., Allied-Bruce Terminix*, 513 U.S. at 277. The Petition for Prohibition also argued, among other things, that the trial court's Arbitration Order was directly contrary to the FAA, and that the West Virginia Supreme Court was required to grant an appeal on the merits under the FAA. In a 3-2 decision, the Supreme Court of Appeals of West Virginia denied the petition on October 24, 2001. App., *infra*, 8a-10a. The Order noted that "Justices Davis and Maynard would grant the petition for a writ of prohibition on the basis that ***federal law would compel arbitration***." App., *infra*, 9a. (emphasis added).

D. Petition For Appeal

Because the mechanism for appealing an order denying arbitration was unclear under West Virginia law, on October 10, 2001, Petitioners also filed a Petition for Appeal, as an alternative to its Petition for Writ of Prohibition, arguing once again that the trial court's Arbitration Order violated the FAA and that the FAA guarantees a right of immediate appeal. The Supreme Court of Appeals of West Virginia denied the Petition for Appeal on January 10, 2002. App., *infra*, 11a-12a. The Petitioners moved for reconsideration.

On March 13, 2002, the Supreme Court of West Virginia denied Petitioners' motion for rehearing in another 3 to 2 decision. App., *infra*, 13a-15a. The Court also stayed the trial court proceedings for 90 days pending the filing of this Petition for Writ of Certiorari with this Court. App., *infra*, 14a-15a.

REASONS FOR GRANTING THE PETITION

The Federal Arbitration Act was originally enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Today, over 75 years later, that same judicial hostility is alive and well, and living in the State of West Virginia. In *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984), this Court expressly held in the context of its jurisdictional analysis that the failure to provide an immediate appeal of an order denying arbitration would "defeat the core purpose of a contract to arbitrate." But more than 15 years later, West Virginia refuses to provide such an appeal, notwithstanding the detrimental effect on a declared federal policy designed to strongly favor arbitration. Not only does the West Virginia decision directly conflict with this Court's decision in *Southland*, but it is contrary to Section 16(a)(1) of the FAA, which expressly provides for a right to appeal the denial of a motion to compel arbitration or to stay judicial proceedings, and it departs from the law of over 40 other states which have implemented appellate procedures consistent with Section 16 of the FAA. *See infra* notes 6 & 7.

In enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10. The FAA "is a congressional declaration

of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive ***or procedural policies*** to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995), and "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA reflects a "statutory policy of ***rapid and unobstructed enforcement*** of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23 (emphasis added). This Court has repeatedly held that state laws which conflict with the purposes of the FAA are improper and preempted by federal law. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688-89 (1996) (reversing Montana Supreme Court and holding state statute preempted by FAA); *Allied-Bruce Terminix Cos.*, 513 U.S. at 271-72 (explaining that the FAA "pre-empts state law" and reversing Alabama Supreme Court decision refusing to enforce arbitration agreement); *Southland Corp.*, 465 U.S. at 16-17 (reversing California Supreme Court and holding state franchise law preempted under the Supremacy Clause).

In addition, Section 16 of the FAA guarantees the right to an immediate interlocutory appeal of an order refusing to stay judicial proceedings pending arbitration, 9 U.S.C. § 16(a)(1)(A). The West Virginia Supreme Court's refusal to provide Petitioners with an immediate appeal pursuant to the FAA conflicts with the highest courts of other states that have found they are bound to follow the procedural requirements of Section 16. *See, e.g., Long v. Industrial Dev. Bd.*, 619 So. 2d 1387, 1388 (Ala. 1993) ("In cases where the Federal Arbitration Act is applicable, 9 U.S.C. § 16 allows an appeal

from a denial of a motion to compel arbitration."); *A.G. Edwards & Sons, Inc. v. Clark*, 558 So. 2d 358, 360 (Ala. 1990) (same); *VCW, Inc. v. Mutual Risk Management, Ltd.*, 46 S.W.3d 118, 121-22 (Mo. Ct. App. 2001) ("in determining our jurisdiction to hear this appeal, we are obliged to apply 9 U.S.C. § 16(a)(1)(A), which allows the appellants to appeal the denial of their motion for a stay") (citing *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 838-39 (Mo. 1985)); *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640, 642 (Neb. 1996) (appeal was before the court "as an interlocutory appeal pursuant to the [FAA]"); *see also Dakota Wesleyan Univ. v. HPG Int'l, Inc.*, 560 N.W.2d 921, 922-24 (S.D. 1997) (applying FAA and dismissing appeal because FAA does not permit immediate appeals of orders compelling arbitration). There is a direct conflict on this issue not only between these states and West Virginia, but also between these states and Connecticut, Delaware, Oregon, and Texas. *See infra* note 4. This Court should grant this Petition so that it may resolve this conflict and eliminate the lack of uniformity between these five minority states and the vast majority of other jurisdictions. *See infra* notes 6 & 7 and accompanying text..

This Court should also grant this Petition because, in violation of the FAA and this Court's prior decisions, West Virginia courts are failing to enforce arbitration clauses unless they are separately "bargained for." *See* Arbitration Order, App., *infra*, 1a-2a at ¶ 3 (citing *Board of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (1977)).[5]

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[5] The trial court mistakenly cited to an earlier 1975 decision in the same case (*Board of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 221 S.E.2d 882 (1975)), which did not discuss West Virginia's "bargained-for" doctrine. There is no dispute among the

(continued...)

This Court thus should grant this Petition as it did in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) where it held that arbitration provisions must be placed "upon the same footing as other contracts."

I. The Decision By The Supreme Court Of Appeals Of West Virginia To Deny An Immediate Appeal Of An Order Refusing To Compel Arbitration And To Stay Judicial Proceedings Violates The Federal Arbitration Act And Conflicts With Decisions Of This Court And Those Of Other State Supreme Courts

A. The Federal Arbitration Act Applies To The Arbitration Provision In The Insurance Contract

Two of the five justices on the Supreme Court of Appeals of West Virginia recognized that "federal law would compel arbitration" in this case, App., *infra*, 10a, but the majority refused to provide any appeal of the trial court's refusal to apply the FAA.

As a matter of law, there is no question that the FAA is applicable to this dispute. The FAA applies to any written contract which *involves* interstate commerce and includes an arbitration clause. 9 U.S.C. §§ 1-2; *Allied-Bruce Terminix Cos.*, 513 U.S. at 277 ("the word 'involving' . . . signals an intent to exercise Congress' commerce power to the full"). After this Court's decision in *United States v. South-Eastern*

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[5] (...continued)
parties that the trial court intended to cite to the 1977 decision in *Board of Education of the County of Berkeley*.

Underwriters Ass'n, 322 U.S. 533 (1944), it has been firmly established that insurance transactions involve commerce and are subject to federal regulation under the Commerce Clause. *See also Securities & Exchange Comm'n v. National Sec., Inc.*, 393 U.S. 453, 458 (1969).

The transactions at issue here involve interstate commerce because the parties are from four different states. *See Rollins, Inc. v. Foster*, 991 F. Supp. 1426, 1430 (M.D. Ala. 1998) (the requirement of interstate commerce is met where plaintiff is a resident of one state and defendant is incorporated in and has its principal place of business in another state). Moreover, the arbitration clause itself expressly states that it is subject to the FAA. When the arbitration clause itself acknowledges the FAA, a court will enforce the parties' agreement to apply federal law. *Staples v. Money Tree*, 936 F. Supp. 856, 858 (M.D. Ala. 1996) ("the court must . . . enforce the stipulation and apply the FAA to the arbitration agreement contained in the contract"). In sum, there was no legitimate justification, rationale, or arguable basis for the trial court's blatant disregard of the FAA in this case, and West Virginia's refusal to provide an appeal from these types of decisions encourages nonadherence to federal policy throughout the state, destroys uniformity amongst states, and seriously undermines the purpose and effectiveness of the FAA.

B. This Court Should Grant The Petition To Clarify That State Courts Are Bound By The Supremacy Clause And Section 16 Of The FAA To Provide A Right To An Immediate Appeal Of A Court's Order Denying A Motion To Compel Arbitration Or To Stay Judicial Proceedings Under The FAA

Section 16 of the FAA guarantees the right to an immediate appeal from an order denying a motion to compel arbitration or an order denying a stay of judicial proceedings pending arbitration. *See* 9 U.S.C. §§ 16(a)(1)(A), (B) (appeals may be taken from an order denying a stay of any action under Section 3 of the FAA or a petition to order arbitration under Section 4 of the FAA). Most states have adopted rules of appellate procedure or statutes which similarly provide the right to an immediate appeal of an order denying arbitration.[6] In other states, case law interpretations of general statutes or rules

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[6] *See, e.g.*, Ala. R. App. P. 4(d); Alaska Stat. § 09.43.160; Ariz. Rev. Stat. Ann. § 12-2101.01; Ark. R. App. P. 2(a)(12); Cal. Civ. Proc. Code § 1294; Colo. Rev. Stat. Ann. § 13-22-221; D.C. Code § 16-4317; Fla. R. App. P. 9.130(a)(3)(C)(iv); Idaho Code § 7-919; Ind. Code Ann. § 34-57-2-19; Iowa Code Ann. § 679A.17; Kan. Stat. Ann. § 5-418; Ky. Rev. Stat. Ann. § 417.220; Me. Rev. Stat. Ann. tit. 14, § 5945; Mass. Gen. Laws Ann. ch. 251, § 18; Minn. Stat. Ann. § 572.26; Mo. Ann. Stat. § 435.440; Mont. Code Ann. § 27-5-324; Neb. Rev. Stat. § 25-2620; Nev. Rev. Stat. Ann. § 38.205; N.M. Stat. Ann. § 44-7A-29; N.D. Cent. Code § 32-29.2-19; Ohio Rev. Code Ann. § 2711.02; Okla. Stat. Ann. Tit. 15, § 817; 42 Pa. Cons. Stat. Ann. § 7320; S.C. Code Ann. § 15-48-200; S.D. Codified Laws § 21-25A-35; Tenn. Code Ann. § 29-5-319; Tex. Civ. Prac. & Rem. Code Ann. § 171.098; Utah Code Ann. § 78-31a-19; Vt. Stat. Ann. tit. 12, § 5681; Va. Code Ann. § 8.01-581.016; Wyo. Stat. Ann. § 1-36-119.

provide this right.[7] Still other states have held that the FAA's provisions concerning a right to interlocutory appeal are applicable or directly binding in state court proceedings. *See supra* pp. 10-11.

The law in all of the above states, representing the vast majority of jurisdictions, uniformly reflects that the immediate review of an order denying a motion to compel arbitration or to stay judicial proceedings is required to safeguard the right to arbitrate by ensuring that a party is not required to litigate an

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[7] *See, e.g., Choate Constr. Co. v. Ideal Elec. Contractors, Inc.*, 541 S.E.2d 435, 436 (Ga. Ct. App. 2000) (order denying motion to compel arbitration is directly appealable under Ga. Stat. Ann. § 5-6-34(b)); *Association of Owners of Kukui Plaza v. Swinterton & Walberg Co.*, 705 P.2d 28, 35 (Haw. 1985) (denial of motion to compel arbitration is appealable as contemplated by Haw. Rev. Stat. § 641-1(b)); *Notaro v. Nor-Evan Corp.*, 456 N.E.2d 93, 94-95 (Ill. 1983) (denial of motion to compel arbitration is immediately appealable under Supreme Court Rule 307(a)(1) as analogous to denial of injunctive relief); *Thomas v. Desire Community Housing Corp.*, 773 So. 2d 755, 759 (La. Ct. App. 2000); *Regina Constr. Corp. v. Envirmech Contracting Corp.*, 565 A.2d 693, 696 (Md. Ct. Spec. App. 1989) (interpreting Md. Cts. & Jud. Proc. § 12-303); *DeCaminada v. Coopers & Lybrand, L.L.P.*, 591 N.W.2d 364, 366 (Mich. Ct. App. 1999) (granting leave to appeal denial of motion brought under MCR 2.116(C)(7)); *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 724 (Miss. 2001) (discretionary appeal permitted under Miss. R. App. P. 5(a)); *Grasser v. United Healthcare Corp.*, 778 A.2d 521, 522 (N.J. Super. Ct. App. Div. 2001) (discretionary appeal permitted under N.J. R. App. P. 2:2-4); *Flanagan v. Prudential-Bache Securities, Inc.*, 495 N.E.2d 345, 347 n.* (N.Y. 1986); *Prime South Homes, Inc. v. Byrd*, 401 S.E.2d 822, 825 (N.C. 1991); *Herzog v. Foster & Marshall, Inc.*, 783 P.2d 1124, 1126-28 (Wash. 1989) (applying Wash. R. App. P. 2.2).

entire dispute before entitlement to arbitration is determined. *See Stedar Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991) (Section 16 ensures that "a party who believes that arbitration is required by an agreement between the parties need not suffer the expense and inconvenience of litigation before receiving appellate review of a district court judgment that arbitration was inappropriate."); David D. Siegel, PRACTICE COMMENTARY: APPEALS FROM ARBITRABILITY DETERMINATIONS, 9 U.S.C.A. § 16 (West Supp. 1997) (explaining that the lack of an immediate appeal from a denial of a motion to compel arbitration would "frustrate" the purpose of the FAA because "the whole substantive dispute would then have to go through ordinary litigation, which could take years, only to have whatever judgment it produced overturned on appeal if and when, at last, a court of appeals were to address the arbitrability point as part of its review of the final judgment, and to reverse the decision and uphold arbitrability"). Indeed, this Court has explained that the right to arbitrate would be eviscerated if it were not vindicated until after the case is tried:

> [T]o delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course ***would defeat the core purpose of a contract to arbitrate.***

Southland Corp., 465 U.S. at 7-8 (emphasis added).

Because the Supreme Court of Appeals of West Virginia has interpreted West Virginia law in a manner which conflicts with and frustrates the objectives of federal law, West Virginia's interpretation of its own law is preempted by the FAA and prohibited by the Supremacy Clause. *See Volt*

Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989) (the FAA preempts state law to the extent the state law "actually conflicts with federal law -- that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). A state may not apply its own procedural rules if those procedures will defeat the objectives of the federal law. *See, e.g, Felder v. Casey,* 487 U.S. 131, 138 (1988) ("[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'") (quoting *Brown v. Western R. Co. of Ala.*, 338 U.S. 294, 296 (1949)); *see also Southern Cal. Edison Co. v. Peabody Western Coal Co.*, 977 P.2d 769, 773-74 (Ariz. 1999) ("Each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the [FAA]").

In this case, the lack of an immediate appeal is not "consistent with the goals of the [FAA]," and would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder,* 487 U.S. at 138 (quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971)). "[T]he purpose of the [FAA] was 'to relieve congestion in the courts and to provide the parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.'" *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.,* 146 F.3d 1309, 1312 (11th Cir. 1998) (citation omitted). The right guaranteed by the FAA is the right to avoid the time and expense associated with litigation. *See Gilmer,* 500 U.S. at 31 (purpose of FAA is to promote the "simplicity, informality, and expedition of arbitration"); *Southland,* 465 U.S. at 8 (purpose of arbitration is to avoid expense and delay associated with litigation). As explained above, Section 16

safeguards the right to arbitrate by ensuring that a party is not required to litigate an entire dispute before entitlement to arbitration is resolved.

The failure to grant the immediate review guaranteed by Section 16 would thwart the Petitioners' right to the speedy and less costly form of dispute resolution provided in the arbitration agreement and would defeat the core purpose of the FAA. Because it would directly conflict with and would frustrate a substantive right created by federal law, any interpretation or application of West Virginia law which does not provide for a right to appeal an order denying a motion to compel arbitration would be preempted by federal law under the Supremacy Clause. *See Volt*, 489 U.S. at 477; *Felder*, 487 U.S. at 138. For all of these reasons, this Court should grant the Petition to resolve the conflict between West Virginia and other states, to protect the federal rights guaranteed by the FAA, and to unify West Virginia with the vast majority of other states which operate consistent with Section 16 of the FAA.

II. This Court Should Grant The Petition To Eliminate The Conflict Between Prior Decisions Of This Court And West Virginia's Refusal To Apply The FAA And Its Failure To Compel Arbitration Under A "Bargained-For" Doctrine

In enacting the FAA, Congress established a strong policy in support of arbitration agreements, requiring that courts "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citation omitted); *accord Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 81 (2000) (FAA established a "liberal federal policy favoring arbitration agreements"); *Doctor's Assocs., Inc.*, 517 U.S. at 685 (FAA established a

"broad principle of enforceability"); *Perry v. Thomas,* 482 U.S. 483, 489 (1987) (FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements").

The FAA provides that arbitration provisions "shall be ***valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract." *Smith Barney, Inc. v. Critical Health Sys. of North Carolina*, 212 F.3d 858, 861 (4th Cir. 2000) (emphasis added); 9 U.S.C. § 2. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved ***in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or . . . [a] defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (emphasis added).

Under the FAA, this Court has repeatedly emphasized that one of the fundamental purposes of the FAA was to put arbitration clauses upon an ***equal footing*** as the other clauses of a contract. *Doctor's Assocs., Inc.*, 517 U.S. at 682 (arbitration provisions must be placed "upon the same footing as other contracts") (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). In *Allied-Bruce Terminix Cos.*, this Court made this principle very clear:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of ***any*** contract.' 9 U.S.C. § 2 (emphasis added). ***What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit),***

> ***but not fair enough to enforce its arbitration clause.*** The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.

513 U.S. at 281 (emphasis added).

In this case, the West Virginia trial court made unjustifiable errors of law under the FAA which require reversal. It did exactly what the FAA and this Court's precedent prohibit – singling out the arbitration provision in the contract for discriminatory treatment and refusing to enforce the arbitration clause, but at the same time allowing the Stillwells to enforce all of the other provisions of the contract. *See Doctor's Assocs.*, 517 U.S. at 682; *Allied-Bruce Terminix Cos.*, 513 U.S. at 281. Specifically, the trial court reasoned that "[a]greements to arbitrate will be enforced in West Virginia only if they are bargained for," and "[t]he arbitration clause in the Plaintiffs' insurance contract was not bargained for by the plaintiffs." App., *infra*, 1a at ¶¶ 1-2. The trial court's disparate treatment of the arbitration provision is impermissible under the FAA and requires reversal. If the contract as a whole was supported by adequate consideration, the contract was bargained for, and absent special circumstances all of its provisions should be enforced in an equitable manner. The FAA and this Court's precedents prohibit heightened scrutiny of an arbitration clause designed to destroy its enforceability. This Court should grant the Petition to declare West Virginia's treatment of the arbitration clause here unlawful under the FAA.

Separately, the Petition should be granted to clarify that, under the FAA, a state court errs when it applies a presumption *against* enforcement of an arbitration provision by requiring the party seeking enforcement to come forward with *evidence* that the arbitration clause was separately bargained for. App., *infra*, 2a, ¶ 4 ("Defendants proffered no evidence that the parties to this contract knowingly bargained for an arbitration clause."). This requirement improperly shifts the burden of proof and turns the strong presumption in favor of arbitration on its head. *See, e.g., Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved ***in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or [a] . . . defense to arbitrability") (emphasis added).

In sum, the Petition should also be granted to eliminate the conflict between West Virginia law and decisions of this Court which hold that the FAA applies to contracts involving interstate commerce, and that the FAA preempts principles of state law (like West Virginia's "bargained for" doctrine) which discriminate against arbitration clauses.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner American Bankers Insurance Company of Florida

JUNE 11, 2002

APPENDIX A

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

ROBERT STILLWELL, ET AL,	)	
Plaintiffs	)	
Vs	)	NO. 00-C-116W
AMERICAN RELIABLE INSURANCE COMPANY, ET AL,	)	
Defendants	)	

ORDER

The above-entitled cause came before the Court on Defendants' motion requesting that this Court compel arbitration and stay this proceeding pursuant to 9 U.S.C. §1 *et seq*. of the Federal Arbitration Act.

The facts necessary to the determination of this motion appear to be the following:

1. The arbitration clause in the Plaintiffs' insurance contract was not bargained for by the Plaintiffs.

2. Agreements to arbitrate will be enforced in West Virginia only if they are bargained for.

3. The question of whether an arbitration provision is "bargained for" must, in order to make arbitration workable, always be a matter of law for the Court to determine and never a question of fact. Bd. of Ed. of

Berkeley Co. v. W. Harley Miller, Inc., 159 W. Va. 120, 221 S.E.2d 882 (1975).

4. An insurance contract is a contract of adhesion and Defendants proffered no evidence that the parties to this contract knowingly bargained for an arbitration clause.

On this showing the Defendants have not established a right to compel arbitration. It is therefore

ORDERED that the Defendants' Motion to Compel Arbitration and Stay Judicial Proceedings is denied.

ENTER this 11 day of June, 2001:

/s/ Ronald E. Wilson
Ronald E. Wilson, Judge

APPENDIX B

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

ROBERT STILLWELL and HELEN STILLWELL, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	NO. 00-C-116W
AMERICAN RELIABLE INSURANCE COMPANY, *et al.*,	)	
Defendants.	)	

ORDER

On the 30th day of August, 2001, there appeared the plaintiffs, by their counsel, Thomas C. Schultz, and Don A. Yannerella; also appeared defendant, American Bankers Insurance Company of Florida, by its counsel, John Preston Bailey and Markham R. Leventhal; also appeared defendant, American Reliable Insurance Company and Campbell Insurance Services, Inc., by their counsel, Kevin S. Burger; also appeared defendant, Berry, Bippus, Chison & Foose, Inc., by its counsel, Susan K. Dirks; and also appeared defendant, Cunningham Lindsey U.S., Inc., by its counsel, Mark E. Kinley.

Whereupon, the Court having first reviewed the memoranda that were filed, then proceeded to hear arguments of counsel on the following issues and made the following rulings:

1. With respect to the motion of American Reliable, American Bankers, and Campbell Insurance Services for certification, pursuant to W. Va. Code § 58-5-2, of the Court's June 11, 2001 order denying the motion to compel arbitration, it is **ORDERED** that said motion for certification is hereby **DENIED**. The Court agrees that the order denying arbitration entered on June 11, 2001, is appealable by writ of prohibition or by direct appeal under W. Va. Code § 58-5-1, but the Court declines to certify an appeal under § 58-5-2 because such certification would result in a stay of discovery which the Court is reluctant to grant. The Court advised defendants that they can petition to appeal the arbitration order and can request a stay directly from the West Virginia Supreme Court of Appeals pending any such appellate proceeding. Counsel for American Bankers orally requested reconsideration of this Court's June 11, 2001 order, or a stay pending appeal and tendered during oral argument for the Court's consideration a copy of the U.S. Court of Appeals' decision in Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504 (7th Cir. 1997) relating to a stay of proceedings pending an appeal of the denial of a motion to compel arbitration. The Court has decided that the Federal Arbitration Act does not apply to this action, and the Court declines to reconsider its June 11, 2001 order. The Court's opinion with respect to the applicability of the Bradford-Scott decision and the request for a stay is set forth in the Court's Letter Opinion dated August 30, 2001, a copy of which is appended to this Order.

The objections and exceptions of all parties to any adverse ruling or order contained herein are noted and saved.

The Clerk shall enter the foregoing and shall mail attested copies of this Order to: (1) Thomas C. Schultz, Esquire,

McLain Building, Ste. 333, 40 - 12th Street, Wheeling, WV 26003; (2) Don A. Yannerella, Esquire, 403 Board of Trade Building, 80 - 12th Street, Wheeling, WV 26003; (3) Kevin S. Burger, Esquire, MARGOLIS EDELSTEIN, 1500 Grant Building, Pittsburgh, PA 15219-2203; (4) Mark E. Kinley, Esquire, STEPTOE & JOHNSON, 4th Floor, Riley Building, 14th & Chapline Streets, P.O. Box 150, Wheeling, WV 26003-0440; (5) Susan K. Dirks, Esquire, BASTIEN & LACY, L.C., P.O. Box 2151, Charleston, WV 25328; (6) John Preston Bailey, Esquire, BAILEY, RILEY, BUCH & HARMAN, L.C., 900 Riley Building, P.O. Box 631, Wheeling, WV 26003; and (7) Markham R. Leventhal, Esquire and Stephan I. Voudris, Esquire, JORDEN BURT LLP, 777 Brickell Avenue, Suite 500, Miami, FL 33131-2803.

Entered this 28 day of September, 2001.

/s/ Ronald E. Wilson, Judge
RONALD E. WILSON, JUDGE
Circuit Court of Ohio County,
West Virginia

AGREED TO:

/s/ Thomas Schultz
Counsel for Plaintiffs, Robert
Stillwell and Helen Stillwell

/s/ Kevin S. Burger
Counsel for Defendants, American
Reliable Ins. Co. and Campbell
Insurance Services, Inc.

/s/ Susan K. Dirks
Counsel for Defendant, Berry, Bipus, Chison & Foose, Inc.

/s/ Stephan I. Voudris
Counsel for Defendant, American Bankers Ins. Co. of Florida

/s/ Mark Kinley
Counsel for Defendant, Cunningham Lindsey U.S., Inc.

FIRST JUDICIAL CIRCUIT
OHIO, BROOKE AND HANCOCK COUNTIES

RONALD E. WILSON, JUDGE
HANCOCK COUNTY COURTHOUSE
NEW CUMBERLAND, WEST VIRGINIA
26047

TELEPHONE
304 / 564-3311 Ext. 231
FAX: 304 / 564-4059

August 30, 2001

* * *

Re: Robert Stillwell, et al. Vs
American Reliable Ins. Co., et al.

LETTER OPINION

I have read Bradford-Scott Data Corporation, Inc., Plaintiff- Appellee, v. Physician Computer Network, Inc., et al., Defendants-Appellants and conclude that the case is not persuasive authority on defendants' request for a stay of Circuit Court proceedings pending appeal.

If the Supreme Court of Appeals of West Virginia decides to hear the defendants' appeal it will also issue a stay of proceedings in my Court. This fact, and the fact that this case has not been set for trial, are the determinative facts in my decision to not stop discovery proceedings pending a decision by the Supreme Court.

It is so ORDERED

/s/ Ronald E. Wilson
Ronald E. Wilson, Judge

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th of October, 2001, the following order was made and entered:

State of West Virginia ex rel. American Reliable Insurance Company, American Bankers Insurance Company of Florida and Campbell Insurance Services, Inc., Petitioners

vs.) No. 012010

Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, Robert Stillwell and Helen Stillwell, Respondents

On a former day, to-wit, September 27, 2001, came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger, their attorney, and presented to the Court their petition, memorandum of law in support thereof, and appendix, praying for a writ of prohibition to be directed against the respondents, the Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, Robert Stillwell and Helen Stillwell, as therein set forth. Thereafter, on the 10th day of October, 2001, came the respondents, Robert Stillwell and Helen Stillwell, by Thomas C. Schultz and Don A. Yannerella, their attorneys, and

presented to the Court their written response with appendix in opposition thereto.

Thereafter, on the 11th day of October, 2001, again came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger, their attorney, and presented to the Court their motion in writing seeking a stay of proceedings in the Circuit Court of Ohio County, pending this Court's ruling on the petition for a writ of prohibition. Thereafter, on the 16th day of October, 2001, came the respondents, Robert Stillwell and Helen Stillwell, by Thomas C. Schultz and Don A. Yannerella, their attorneys, and presented to the Court their written response in opposition thereto.

Finally, on the 17th day of October, 2001, again came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger, their attorney, and presented to the Court their motion in writing to consolidate the petition for a writ of prohibition filed in this Court on the 27th day of September, 2001, with the petition for appeal filed in the Circuit Court of Ohio County on the 10th day of October, 2001, for the reasons stated therein. Thereafter, on the 22nd day of October, 2001, came the respondents, Robert Stillwell and Helen Stillwell, by Thomas C. Schultz and Don A. Yannerella, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioners is hereby refused. Justices Starcher and Albright refuse the petition for a writ of prohibition on the basis that consideration of this matter is premature and can be considered on appeal. Justice Davis and Maynard would grant the petition for a writ of prohibition on the basis that federal law would compel arbitration.

Petitioners' motion for a stay of proceedings is hereby refused as moot. Petitioners' motion to consolidate is hereby refused as moot.

A True Copy

Attest: /s/ Roy L. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th of January, 2002, the following order was made and entered:

Robert Stillwell and Helen Stillwell,
individually and on behalf of all
others similarly situated, Plaintiffs
Below, Respondents

vs.) No. 012231

American Reliable Insurance Company,
et al., Defendants Below

American Reliable Insurance Company,
Campbell Insurance Services, Inc.,
and American Bankers Insurance
Company of Florida, Defendants
Below, Petitioners

On a former day, to-wit, October 24, 2001, came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger and Margolis Edelstein, their attorneys, and presented to the Court their petition praying for an appeal from judgments of the Circuit Court of Ohio County, rendered on the 12th day of June, 2001, and on the 1st day of October, 2001.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Maynard would grant.

A True Copy

Attest: /s/ Roy L. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th of March, 2002, the following order was made and entered:

Robert Stillwell and Helen Stillwell,
individually and on behalf of all
others similarly situated, Plaintiffs
Below, Respondents

vs.) No. 012231

American Reliable Insurance Company,
et al., Defendants Below

American Reliable Insurance Company,
Campbell Insurance Services, Inc.,
and American Bankers Insurance
Company of Florida, Defendants
Below, Petitioners

On a former day, to-wit, February 11, 2002, came the petitioners American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger and Margolis Edelstein, their attorneys, and presented to the Court their motion in writing requesting this Court's reconsideration of its order entered on the 10th day of January, 2002, or, in the

alternative, for a stay of proceedings in the Circuit Court of Ohio County, for the reasons stated therein.

This matter initially came before the Court on petitioners' petition for appeal of the circuit court ruling on petitioners' motion to compel arbitration of this matter and stay further proceedings in the circuit court pursuant to the Federal Arbitration Act. 9 U.S.C. Section 1, *et seq*. The circuit court preliminarily denied the motion to compel arbitration based upon findings of fact and analysis of state law. The petition for appeal was denied by the aforementioned order entered on the 10th day of January, 2002. In the current motion, petitioners again seek to appeal the merits of the order denying arbitration and to stay all proceedings in the circuit court pending resolution of the appeal.

Upon consideration whereof, the Court is of the opinion that an appeal of the merits of this matter continues to be premature. Specifically, it appears that issues of fact and of state law have not been finally determined below, which issues may determine the questions of when and to what extent the Federal Arbitration Act applies to the contracts involved in this case. Accordingly, it is hereby ordered that the motion for reconsideration of this Court's order entered on the 10th day of January, 2002, refusing the petition for appeal in the above-captioned proceeding be, and it hereby is, refused. Chief Justice Davis and Justice Maynard would grant.

It is further ordered that the motion for a stay of proceedings in the Circuit Court of Ohio County be, and it hereby is, granted in order to permit the filing of a petition for a writ of certiorari with the Supreme Court of the United States. It is finally ordered that proceedings in the Circuit Court of

Ohio County in the above-captioned proceeding, be, and they hereby are, stayed for a period of ninety days from the date of this order. Justice Maynard would refuse the motion for a stay of proceedings.

A True Copy

Attest: /s/ Roy L. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX F

AMERICAN RELIABLE INSURANCE COMPANY
A Subsidiary of American Bankers Insurance Group
HOME OFFICE:
8655 E. Via De Ventura
Scottsdale, Arizona 85258
(602) 483-8666
(800) 535-1333

SPECIAL MOBILE HOMEOWNERS POLICY

* * *

GENERAL POLICY CONDITIONS

These general conditions apply to your policy. This policy is issued in reliance upon the truth of your representations, and this policy includes all agreements existing between you and us or any of your agents.

* * *

ARBITRATION CLAUSE

Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions of this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by

arbitration in accordance with the Federal Arbitration Act (9 U.S.C. § 1 ET SEQ).

You shall appoint one arbitrator and we shall appoint an arbitrator. The two arbitrators appointed shall together pick a third arbitrator. Any decision of the arbitrators shall be by majority vote. In all other respects, the rules and procedures of the American Arbitration Association's Commercial Arbitration Rules shall govern the arbitration proceeding, except to the extent that such rules and procedures conflict with the Federal Arbitration Act. Arbitration shall be held in the city and state where the insured(s) resides, unless otherwise agreed, in writing, by the parties. In no event shall the arbitrators grant any relief not available in the courts of the state where the policy is issued. Judgment upon the arbitration award shall be entered in a court of general jurisdiction in the state where you reside. Appeals may be taken from the arbitrators' decision only in accordance with the Federal Arbitration Act.

You and we understand that:

1. discovery in an arbitration proceeding may be more limited than and different from that in a court proceeding;

2. the arbitrators are not required to state the basis of their decision or to issue any findings of fact; and

3. both your and our right to appeal or to seek modification of rulings by the arbitrators may be limited.